

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
VoiceStream PCS I License L.L.C.)	File No. EB-02-KC-500
Owner of Antenna Structure #1226514)	
Near Davis City, Iowa)	NAL/Acct. No. 200232560017
)	
Bellevue, Washington)	FRN 0001-5651-34

FORFEITURE ORDER

Adopted: June 30, 2003**Released: July 2, 2003**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) to VoiceStream PCS I License L.L.C. (“VoiceStream”), for repeated violations of Section 17.51(b) of the Commission’s Rules (“Rules”).¹ The noted violation involves VoiceStream’s failure to continuously exhibit all high intensity and medium intensity obstruction lighting.

2. On July 24, 2002, the Commission’s Kansas City, Missouri, District Office (“Kansas City Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to VoiceStream for a forfeiture in the amount of ten thousand dollars (\$10,000).² VoiceStream filed its response to the NAL on August 23, 2002.

II. BACKGROUND

3. On June 24, 2002, an agent from the Kansas City Office, while conducting random tower inspections, inspected an antenna structure near Davis City, Iowa. During the inspection, the agent determined that the antenna structure did not exhibit all the required high intensity and medium intensity obstruction lighting. The agent noted that the posted antenna structure number was 1226514.

4. The agent checked the Commission’s Antenna Registration Data Base on June 27, 2002, and found that VoiceStream is the registered owner of antenna structure # 1226514 and that VoiceStream’s contact person is Dan Menser, Esq. On the same date, the agent contacted Mr. Menser by telephone and told him about the outage at antenna structure # 1226514. Mr. Menser stated that he would check on the outage.

¹ 47 C.F.R. § 17.51(b).

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232560017 (Enf. Bur., Kansas City Office, released July 24, 2002).

5. The agent conducted a telephone interview with Mr. Menser on July 2, 2002, concerning the outage at antenna structure # 1226514. During the interview Mr. Menser stated that the photocell at antenna structure # 1226514 became damaged, causing the high and medium intensity obstruction lighting to become inoperable and the red obstruction lighting (required only from sunset to sunrise) to operate during both daylight and nighttime hours, and that VoiceStream repaired the photocell on June 29, 2002. Mr. Menser also stated that VoiceStream did not notify the Federal Aviation Administration ("FAA") of the outage at any time³ because "the red lights and beacon were operational and . . . no alarms were received." After the interview, Mr. Menser e-mailed a copy of VoiceStream's "Monthly and Quarterly Check of FAA Lighting and FAA Outages Log" to the agent. According to this log, VoiceStream inspects the automated alarm system for antenna structure # 1226514 every month and visually checks for lighting outages every three months. The log indicates that the most recent visual check was on May 30, 2002, and that the most recent monthly inspection of the automatic monitoring system was on June 18, 2002.

6. On July 24, 2002, the Kansas City Office issued a *NAL* for a forfeiture in the amount of \$10,000 to VoiceStream for willful and repeated failure to continuously exhibit all high intensity and medium intensity obstruction lighting, in violation of Section 17.51(b) of the Rules. In its response, filed August 23, 2002, VoiceStream seeks cancellation or mitigation of the monetary forfeiture. Although VoiceStream admits that it violated Section 17.51(b), it contends that it did not do so willfully or repeatedly. In addition, VoiceStream asserts that the violation of 17.51(b) is mitigated by its "frequent inspections prior to the single lighting malfunction" and "implementing a swift remedy" and by its having "not experienced a similar equipment failure or been the subject of a violation of Commission Rules pertaining to tower lighting."

III. DISCUSSION

7. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). In examining VoiceStream's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶

8. Section 17.51(b) of the Rules provides that all high intensity and medium intensity obstruction lighting shall be exhibited continuously unless otherwise specified." In its response to the

³ The owner of any registered antenna structure must report immediately to the nearest flight service station of the FAA any observed or otherwise known extinguishment or improper functioning of any flashing obstruction light not corrected within 30 minutes. See 47 C.F.R. § 17.48.

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 47 U.S.C. § 503(b)(2)(D).

NAL, VoiceStream admits it did not comply with Section 17.51(b) but contends that it not violate Section 17.51(b) willfully or repeatedly.⁷ The Commission detected the lighting outage at antenna structure # 1226514 on June 24, 2002. The outage continued until it was corrected on June 29, 2002 – a five day period. A continuous violation is “repeated” if it continues for more than one day.⁸ We conclude that VoiceStream repeatedly violated Section 17.51(b) of the Rules between June 24 and 29, 2002.

9. Section 503(b) of the Act gives the Commission authority to assess a forfeiture penalty against any person if the Commission determines that the person has “willfully or repeatedly” failed to comply with the provisions of the Act or with any rule, regulation or order issued by the Commission. In light of our determination that VoiceStream’s violations were repeated, it is not necessary to determine whether they were also willful.⁹

10. No mitigation is warranted on the basis of VoiceStream’s correction of the violation. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), “corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.”¹⁰

11. No mitigation is warranted on the basis that VoiceStream “has not experienced a similar equipment failure or been the subject of a violation of Commission Rules pertaining to tower lighting.” To warrant mitigation, VoiceStream would need to show a history of *overall* compliance – not just compliance with the rules pertaining to tower lighting – and it is clear that VoiceStream does not have a history of overall compliance.¹¹

12. VoiceStream asserts that it made regular monthly inspections of its automatic alarm system as well as quarterly visual inspections of the tower lighting. VoiceStream’s last visual check of the lighting prior to the June 24-29, 2002, outage was on May 30, 2002, and its last monthly inspection of the automatic monitoring system was on June 18, 2002.¹² Given these circumstances, we find that that

⁷ Although VoiceStream argues that its tower lighting violations were neither willful nor repeated, it provides nothing to support its claim that the violations were not repeated.

⁸ See 47 U.S.C. § 312(f)(2).

⁹ *Koke, Inc.*, 23 FCC 2d 191 (1970).

¹⁰ See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVV, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

¹¹ See, e.g., *VoiceStream PCS License I LLC*, 16 FCC Rcd 7584 (Enf. Bur. 2001) (forfeiture paid), which involved VoiceStream’s failure to post antenna structure registration numbers at eleven antenna sites, in violation of 47 C.F.R. § 17.4(g). In the case cited by VoiceStream, *USA Tower, Inc.*, 16 FCC Rcd 13182 (Enf. Bur. 2001), the tower owner had a history of overall compliance, which was the basis for the mitigating the forfeiture in that case.

¹² According to VoiceStream’s response to the *NAL*, its automatic alarm system failed to detect the lighting outage because of a design defect: the system could be triggered only by failure of both the high and medium intensity obstruction lighting and the red obstruction lighting. In this case, there was no triggering because only the high and medium intensity obstruction lighting failed.

forfeiture amount should be reduced to \$8,000 on the basis of VoiceStream's good faith¹³ efforts to comply with the requirements of Section 17.51(b) of the Rules.

13. We have examined VoiceStream's response to the *NAL* pursuant to the statutory factors above and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that VoiceStream repeatedly violated Section 17.51(b) of the Rules and find that, while there is no basis for cancellation of the proposed monetary forfeiture, a reduction to \$8,000 is warranted.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁴ VoiceStream **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for failure to continuously exhibit all high intensity and medium intensity obstruction lighting, in repeated violation of Section 17.51(b) of the Rules.

15. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁵ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200232560017 and FRN 0001-5651-34. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁶

16. **IT IS FURTHER ORDERED** that copies of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Dan Menser, Senior Corporate Counsel Regulatory Affairs, VoiceStream PCS I License L.L.C, 401 Ninth Street, N.W., Suite 550, Washington, D.C. 20004.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹³ See Section 1.80(b)(4) of the Rules, 47 C.F.R. § 1.80(b)(4), *Guidelines for Assessing Forfeitures, Part II, Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment Criteria*.

¹⁴ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁵ 47 U.S.C. § 504(a).

¹⁶ See 47 C.F.R. § 1.1914.